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Nos. 635, 636, 637, 638, 639, 640, 641, 642, and 643

In the Supreme Court of the United States

OCTOBER TERM, 1930

MERCHANTS WAREHOUSE COMPANY, APPELLANT, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JAMES GALLAGHER, ET AL.

MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL., APPELLANTS, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JAMES GALLAGHER, ET AL.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL., APPELLANTS, *v.* MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' & IMPORTERS' EXCHANGE OF PHILADELPHIA

THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY, APPELLANT, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL.

THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL., APPELLANTS, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WALTER A. BAILEY, ET AL., APPELLANTS, *v.* THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' EXCHANGE OF PHILADELPHIA

THE PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, APPELLANT, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND REX & COMPANY, INC., ET AL.

PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL., APPELLANTS, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND REX & COMPANY, INC., ET AL.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL., APPELLANTS, *v.* THE PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' & IMPORTERS' EXCHANGE OF PHILADELPHIA

APPEALS AND CROSS-APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 635

MERCHANTS WAREHOUSE COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and James Gallagher, et al.

No. 636

MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, et al., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and James Gallagher, et al.

No. 637

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Walter A. Bailey, et al., appellants

v.

MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' & IMPORTERS' EXCHANGE OF PHILADELPHIA, et al.

No: 638

THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY, appellant

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and WALTER A. BAILEY, et al.

No. 639

THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, the Commercial Exchange of Philadelphia, Board of Trade, et al., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and WALTER A. BAILEY, et al.

No. 640

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WALTER A. BAILEY, et al.,

v.

THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, the Commercial Exchange of Philadelphia, Grocers' Exchange of Philadelphia, et al.

No. 641

THE PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, appellant

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and REX & COMPANY, INC., et al.

No. 642

PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, the Commercial Exchange of Philadelphia, Philadelphia Board of Trade, et al., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Rex & Company, Inc., et al.

No. 643

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Walter A. Bailey, et al., appellants

v.

THE PHILADELPHIA WAREHOUSING & COLD STORAGE Company, the Commercial Exchange of Philadelphia, Grocers' & Importers' Exchange of Philadelphia, et al.

APPEALS AND CROSS APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 30) is reported in 44 Fed. (2d) 379. The

court's findings of fact and conclusions of law appear at R. 58–63. Opinion granting stay order appears at R. 91. The report of the Interstate Commerce Commission (R. 142) is reported in 160 I. C. C. 563.

QUESTIONS PRESENTED

The first question is whether the appellants have standing to maintain an independent suit to set aside the Commission's order.

On the merits the principal question is whether the Commission's order, which requires the three trunk-line railroads serving Philadelphia to cease paying allowances to appellants in order to remove unjust discrimination, undue preference of appellants, and undue prejudice to the complainants in the Commission proceeding, is within the Commission's power and otherwise valid, the subordinate questions in that connection being:

I. Whether appellants are shippers, that is, "persons" within the meaning of that term as employed in sections 2 and 3 of the Interstate Commerce Act, for whom the transportation of property at lower rates than those charged for similar transportation for complainants constitutes discrimination in violation of those sections.

II. Whether appellants' warehouses are operated as public freight stations of the carriers.

III. Whether the Commission's finding that the payment of the allowances to appellants results in unjust discrimination in their favor and undue

prejudice against the complainant warehouse companies is supported by substantial evidence.

IV. Whether, even if the services appellants perform are transportation services, the payment by the carriers of allowances to them and the withholding of allowances to complainants for similar services is an "undue" discrimination.

V. Whether the Commission, having found that the services performed by appellants and complainants were not "transportation" services but instead were warehouse trade services, properly required the carriers to remove the discrimination by stopping the allowances to appellants rather than continuing to pay them to appellants and extending them to complainants and all others similarly circumstanced.

On the cross appeals the question is whether the court below erred in staying the operation of the Commission's order pending appeal.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Elkins Act are set forth in the Appendix, pages 94–105.

STATEMENT

These are appeals from a final decree of the court below (R. 95) dismissing, for want of equity, separate petitions filed by the appellants in Nos. 635, 638, and 641 to enjoin and set aside the order (R. 151) entered by the Interstate Commerce Com-

mission December 28, 1929, in a proceeding entitled *James Gallagher et al.* v. *Pennsylvania Railroad Company*, which also embraced *Walter A. Bailey et al.* v. *Baltimore & Ohio Railroad Company* and *Rex & Company, Incorporated, et al.*, v. *Reading Company*, Nos. 20968 and sub-Nos. 1 and 2, and cross-appeals from orders of the court staying the operation of the Commission's order pending appeal.

The order requires the three carriers, defendants in the Commission proceeding, to cease paying allowances to appellants[1] in connection with the loading and unloading of package freight at Philadelphia and to cancel their tariff provisions which publish the allowances or which make any of appellants' warehouses a part of their station facilities at Philadelphia.[2]

The order was made in a proceeding begun by the filing of three formal complaints (R. 112, 117, 120), pursuant to section 13(1) of the Interstate Commerce Act, by six warehousemen,[3] hereinafter

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[1] Unless indicated to the contrary, the term appellants as used herein will refer to the Merchants Warehouse Co., the Pennsylvania Warehousing & Safe Deposit Co., and the Philadelphia Warehousing & Cold Storage Co., appellants in Nos. 635, 638, and 641.

[2] The order also requires the Pennsylvania R. R. Co. to stop paying allowances to the Quaker City Cold Storage Co. That Company did not join in the suit to enjoin the Commission's order. Nor did any of the carriers join in the suits. (R. 36.)

[3] James Gallagher, Walter A. Bailey, Rex & Company, Inc., Terminal Warehouse Co., Northeastern Warehouse Co., Industrial Cold Storage & Warehouse Co.

called complainants, engaged in the operation of warehouses in Philadelphia at and from which they ship and receive, load, unload, store, distribute, and deliver in small quantities, carloads of merchandise, known as package freight—including practically all commodities except freight in bulk and automobiles—which they have previously solicited for such handling from their customers located generally in cities outside of Pennsylvania. For those services they collect from their customers certain warehouse rates and charges.

Appellants operate in Philadelphia, in keen competition with complainants, the same type of warehouses and render the same kind of services generally. Their charges vary according to the nature of the merchandise handled, but are usually at a stated sum per package per month, frequently with a labor or handling charge in addition, and their charges include such services as "unloading car, placing in storage, and delivering either to car or tailboard of truck, making out bills of lading and addressing for shipment," notifying the patron's customers "promptly upon arrival of cars, thus enabling them to withdraw their merchandise immediately, if desired," and other services. (Exs. 2 and 3[1]; Ex. 6, R. 549–555; Ex. 41; Exs. 42–47, R. opp. 596; Ex. 49; Exs. 50–51, R. opp. 598.)

[1] Where no record page reference is given herein following exhibit numbers, the exhibits will be found in "Volume of Exhibits Physically Reproduced."

Each of the complainants' warehouses and each of the appellants', except four, is served by an industrial side track connecting with one or more of the three Philadelphia railroads. (Exs. 35 and 36, R. 570–571.)

The complaints filed with the Commission alleged that each of the complainants and each of the appellants "in the conduct of his or its warehouse business, shipped numerous carloads, and smaller lots, of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property" to the carriers for transportation and "caused numerous carloads, and smaller lots, of property to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them" by the carriers in Philadelphia. (R. 114–115, 118, 123.) The complaints further alleged, in substance, that the respective carriers, at the time they transport property for complainants and appellants, collect their published rates but that later, by means of the allowances, which are devices for granting the appellants special rates, rebates, drawbacks, and concessions, they refund and remit to appellants part of said published rates, with the result that they transport property for appellants at net rates that are materially less than their published rates, by reason of which complainants are subjected to the payment of rates and charges for transportation which are unjustly discriminatory,

unduly preferential of appellants and unduly prejudicial to complainants, in violation of sections 2 and 3 of the Interstate Commerce Act. (R. 115–116; 119; 123–124.)

The warehouses operated by both complainants and appellants are of the type known as "merchandise" warehouses, as distinguished from those engaged in long term storage of such articles as household goods or furniture. Their principal functions are (1) the maintenance of "spot stocks" for manufacturers and others; (2) the receipt of merchandise shipped to them in carload lots and the immediate or subsequent distribution thereof in small or less-than-carload quantities in Philadelphia and in adjacent territory. Many of their customers are nationally-known manufacturers or producers of such commodities as soap, rubber products, canned goods, coffees, cereals, etc., whose factories are located in various cities throughout the country and who regularly use merchandise warehouse service in marketing and distributing their goods in Philadelphia and other large cities. (Exs. 2 and 3; Ex. 4, R. 531–548; Ex. 5, R. 548–549; Ex. 6, R. 549–555; Exs. 12 and 13, R. 558–562; Exs. 14 and 19–29, R. opp. 562; Exs. 15, 16, 17, 18; Ex. 30, R. 563–565; Ex. 41; Exs. 42–47, R. opp. 596; Ex. 48, R. 597; Ex. 49; Exs. 50–51, R. opp. 598.)

Exhibit No. 18, an official publication of the United States Department of Commerce, entitled "The Merchandise Warehouse in Distribution,"

gives a full description of the operation of warehouses of the type here involved; and it was not denied that this publication accurately describes the business of both the appellant and complainant warehouses. (R. 274–275.)

A brief résumé of the services they render is given in the Commission's report:

> In all the larger cities, including Philadelphia, public warehouses are customarily used for the receipt, storage, and distribution of merchandise. That these warehouses perform an important public service is indisputed. The merchandise warehouse receives goods in carloads and distributes them in smaller quantities to local jobbers or retailers, or reships them in less-than-carload lots to near-by destinations; issues negotiable and nonnegotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties, and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin.

> Both complainants and the contract warehouses [appellants] furnish these services. (Report, p. 564, R. 144.)

An important reason for the employment of these warehouses is the fact that by doing so the application of the carload rate is obtained, whereas if the distribution in small quantities were made by the manufacturer, wholesaler, or shipper direct, the high less-than-carload rate would apply.

From an early date it has been the general practice of railroads to fix a lower rate for a carload than for a less-than-carload, and the difference or "spread" between the two rates is substantial. (Ex. 39, R. 596.) But the carriers enforce rules to prevent the application of the carload rate when they are called upon to perform greater service than normal carload service. These are Rules 14 and 23 of the Consolidated Freight Classification (Ex. 33, R. 567).* Rule 14 provides that carload rates apply only when a carload of freight is shipped from one station, in or on one car, in one day, by one shipper for delivery to one consignee at one destination. Only one bill of lading from one loading point and one freight bill shall be

*This is a consolidation of the three classifications formerly published as separate issues—the Official, the Southern, and the Western. Compare *Int. Comm. Comm.* v. *Del., L. & W. R. R.*, 220 U. S. 235, 241. The Consolidated Classification now applies throughout the United States on interstate traffic. It is, of course, filed with the Commission under section 6 of the Interstate Commerce Act, and has the same binding force as all tariff schedules.

issued for such carload shipment. Rule 23 forbids the carriers' agents to act as agents of shippers or consignees for the assembling or distribution of carload freight, directs that agents at points of shipment must not accept freight to be carried at carload rates for distribution to two or more parties by carriers' agents at points of destination, directs that agents at points of destination must deliver freight carried at carload rates to one consignee only and must not accept orders from shippers or consignees calling for split deliveries according to brands, marks, sizes, or other identification of packages, and provide that if, at the request of the owner of the property or his authorized agent, a carload shipment is delivered to more than one consignee, less-than-carload rates will be applied on the entire shipment.

Under these rules the carload rates cannot be obtained upon carload consignments intended for distribution in small or less-than carload quantities at point of destination unless some one other than a railroad agent is employed to accept the shipment from the railroad *as a carload* and attend to the distribution.

The merchandise warehouse is employed for this purpose. It is also employed to assemble small quantities of goods and forward them in carload lots. The fact that this saving in transportation costs can be effected through utilization of the services of these warehouses largely accounts for their existence.

Both appellants and complainants obtain business by widespread advertising in prominent trade publications, by sending letters, pamphlets, and circulars to prospective customers, offering them their services, and by personal solicitation.* By these means, they induce manufacturers, wholesalers, and producers to ship their products to them, in carload lots, for distribution, storage, or other warehouse trade storage. (R. 269.) The inbound, carload traffic constitutes the major portion of their business. (R. 275, 442.) The shipments are usually consigned to a named party "in care of" the warehouse at which the carrier is to make delivery. (R. 189, 233, 306, 279, 283.) When such a carload arrives at Philadelphia, notice of arrival in the regular form is given by the carrier to the warehouse (R. 327, 350, 371; 422-423; Exs. 80 and 96), and thereafter delivery is made by placing the car upon the warehouse side-track. The unloading is performed by warehouse em-

* Appellants. Merchants Warehouse Co.: Ex. 2; Ex. 3; Ex. 4, R. 531, 544; Ex. 6, R. 549–555; Ex. 12, R. 558–560; R. 187–189, 194. Pennsylvania Warehousing & Safe Deposit Co.; Ex. 41; Exs. 42–48, R. opp. 596; 304; Philadelphia Warehousing & Cold Storage Co.: Ex. 49; Exs. 50 and 51, R. opp. 598.

Complainants. Terminal Warehouse Co.: Ex. 14, R. opp. 562; Exs. 15, 16, 17, 18; Exs. 19–29, R. opp. 562; R. 267–275. Northeastern Warehouse Co.: Ex. 8; R. 218, 219; James Gallagher: Ex. 41; R. 251–254. Walter A. Bailey: R. 202–218. Rex & Co., Inc.: R. 243–246. Industrial Cold Storage & Warehouse Co.: R. 234–240. All complainants: Ex. 13, R. 560–562.

ployees, and the warehouse stores, distributes, or reships in less-than-carload quantities, in accordance with the instructions of the shipper or owner. (R. 189, 192, 305, 311; 203–204; 220, 236–237, 270–273, 278–279.)

When an outbound carload shipment is to be made by the warehouse, it orders an empty car and thereupon the railroad "spots" the car upon the warehouse side track. (R. 385.) The goods are loaded into the car by the warehouse (R. 385), bill of lading is obtained from the railroad agent (R. 386), and the car goes forward, as directed by the warehouse.

Many of the outbound less-than-carload shipments are transported from the warehouse in "ferry" or "trap" cars.[7] (R. 443; Ex. 6, R. 553, 555; Ex. 37, R. 572.)

It is upon such shipments that the carriers pay allowances to appellants. These allowances differ in amount and application according to the traffic.

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[7] As explained in *Trap or Ferry Car Service Charges*, 34 I. C. C. 516, the term trap or ferry car is applied to a car placed at an industry or commercial house having a private siding, and there loaded by a shipper with less-than-carload shipments, and hauled by a carrier to its local freight or transfer station for handling and forwarding of contents. It is also applied to a car loaded with less-than-carload shipments which is hauled to and placed upon the private track of an industry or commercial house by the carrier from a local or transfer station. The use of such cars saves the shipper the expense of draying his l. c. l. shipments to the carrier's freight station, *ibid*, 521.

In certain instances they are applied to both carload and less-than-carload shipments, inbound and outbound, and in other instances they are given only on inbound carload shipments. They range from 2.5 cents per barrel on flour to 50 cents per ton on other freight. (Ex. 7, R. 556; R. 304, 309.) They are not paid by the carriers to all the appellants but only to the particular ones with which they have entered into contracts. (R. 447.) The Pennsylvania gives allowances on all freight handled by the Merchants Warehouse Co., inbound and outbound, carloads, and less-than-carloads. (R. 442.) The Baltimore & Ohio gives allowances to the Pennsylvania Warehousing & Safe Deposit Co. on carload freight inbound and outbound but none on less-than-carload freight. (R. 302–304, 401.) The Reading gives allowances to the Pennsylvania Warehousing & Safe Deposit Co. and the Philadelphia Warehousing & Cold Storage Co. on inbound carload freight but none on outbound carload freight and none on less-than-carloads. (R. 302–304, 364, 400.)

The aggregate of the allowances paid is substantial. At the Commission hearing a witness for the Merchants Warehouse Co. estimated that the total amount paid his company by the Pennsylvania for the year 1927 was approximately $200,000. (R. 393.) At the preliminary hearing in the court below the exact figures were given for 1926–1929.

The allowances received by the three appellants from the three railroads during that four-year period aggregated $809,543.56. (R. 179–180.)

The conditions under which the allowances are given are set forth in several written agreements between the carriers and the appellants.[4] (Ex. 1, R. 455–526; Exs. 53–57, R. 603–692; Ex. 86–88, R. 711–739.) The practice of the carriers of making such contracts with particular warehouse companies at Philadelphia originated many years ago. The practice is not generally followed elsewhere by the carriers. (R. 341, 446.) Many of the warehouses operated by appellants are owned by them; others are leased from the railroads, and where this is the case, the contracts above mentioned also cover the letting of the property, the amount of the rental, etc.

The allowances made by the Pennsylvania are published in tariff form (Exs. 62, 98, R. 698–704, 739–743), but neither the B. & O. nor the Reading has filed tariffs covering the allowances they pay to their contract warehouses. (R. 361, 368.)

No allowances are paid by the carriers to any of the complainants. The Commission found, how-

[4] These contracts constitute part of the evidence supporting the Commission's finding that "traffic considerations have been the primary motive for the payment of the allowances," and further reference will be made to them in part V hereof, under the subheading "The allowances are given in consideration of the appellants causing their traffic to be routed over the lines of the respective carriers," pages 79–87.

ever, that the complainants perform the same services as appellants:

> The services performed by the contract warehouses do not differ in substance from those rendered by complainants. The warehouses of complainants and those of the contract warehouses are served by private sidetracks or sidings connecting with the lines of one or more defendants. Both handle the same classes of freight and both obtain business by widespread advertising in prominent trade publications, by sending letters, pamphlets, and circulars to prospective customers offering them their services, and by personal solicitation. There is active and keen competition between complainants and the contract warehouses. Concerns using public-warehouse facilities generally select the company offering them the lowest aggregate charge [made up of the railroad freight rate to the warehouse and the warehouse charge, R. 276] for the distribution of their goods. By means of the allowances the contract warehouses are able to quote lower charges than can complainants. (Rep., p. 566, R. 146–147.)

In defending the case before the Commission the carriers, and appellants who had intervened as defendants, rested the defense upon grounds briefly summarized at page 567 of the Commission's report, as follows:

> Defendants take the position that under their tariffs they are required to load and

unload carload and less-than-carload package freight at Philadelphia; that they lawfully employ the contract warehouse as agents to perform these loading and unloading services, and that the allowances paid therefor are compensation for such services; that there is no legal obligation on the part of defendants to make complainants' warehouses their stations or to employ complainants as their agents to load and unload freight; that the contract warehouses are neither consignors nor consignees of the freight handled by them; and that the allowances paid to such warehouses, being for transportation services rendered, are not illegal. The contention of the contract warehouses and interveners in behalf of defendants are similar to those of defendants.

Rule 27 of the Consolidated Classification provides:

> Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings. (Ex. 33, R. 568.)

By exceptions to Rule 27, however, the railroads agree to load or unload package freight at some but not all of their Philadelphia freight stations, except when handled direct to or from cars on team tracks at owner's request. (Ex. 61, R. 697; Ex. 82, R. 708; Ex. 85, R. 710.) A tariff of the Pennsylvania (Ex. 59, R. 693–695) provides that these stations include the "facilities" of the Merchants

Warehouse Company. Another tariff of the Pennsylvania (Ex. 60, R. 696) provides that the Merchants' warehouses will be considered freight stations during the free time in the application of storage rules and charges as published in Agent B. T. Jones' I. C. C. 1491. (See R. 447.) A tariff of the B. & O. (Ex. 85, R. 710-711) provides that carload freight handled at four of the Pennsylvania Warehousing & Safe Deposit Company's warehouses will be subject to the same rules and regulations as to loading and unloading as are in effect at Pier 62, which is one of the seven stations at which it will load and unload carload package freight. The Reading Company, though paying allowances to the Pennsylvania Warehousing & Safe Deposit Co. on carload shipments to all its warehouses, (R. 303) has not provided in its tariffs that those warehouses are its freight stations or that they will be considered such for any purpose. Nor has the Reading published any such tariff provisions in support of its allowances to the Philadelphia Warehousing & Cold Storage Co. (R. 309.)

Complainants urged before the Commission, among other things, "that the allowances are in fact rebates given for the purpose of buying freight traffic controlled by the contract warehouses and causing it to be transported over defendant's lines; that the facilities of the contract warehouses are not railroad freight stations or used by the general pub-

lic as such; that the contract warehouses are the actual shippers of the freight handled by them; that the contract warehouses do not perform any task for defendants that entitle them to receive allowances; and that the loading and unloading of freight by the contract warehouses is not in fact transportation service and that allowances therefor, being for trade services, are illegal." (Rep. p. 566, R. 147.)

The Commission said there is much conflicting testimony in the record with respect to the foregoing contentions, but that the weight of the evidence supports those advanced by complainants. "Among other things," the Commission said, "the record is persuasive that—

> "the contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations but are confined to the handling of merchandise for the patrons of the warehouses; and that the services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are

in fact performed for the benefit of the owner of the merchandise, rather than for defendants.

"While the contract warehouses are not the owners of the goods received or shipped by them, all of defendants' dealings are with these companies and none with the owners of the goods. As to many of the inbound carload shipments the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to complainants, shipments from and to their warehouses being handled in substantially the same manner." (Rep. 567, R. 147–148.)

The Commission's ultimate finding was as follows:

Following *McCormick Warehouse Co.* v. *Pennsylvania R. Co., supra,* and upon this record, we find that the practice of defendants in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid, and refusing to make

> similar allowances to complainants, for performing similar services, results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. (Rep. 569, R. 150.)

There were two methods by which the discrimination and prejudice thus found could conceivably be corrected, first, by extending to complainants similar allowances for the similar services they performed; second, by elimination of the allowances to the contract warehouses. The Commission adopted the second method because it found that the services in question were not rendered for the railroads but were warehouse trade services rendered by both the contract and complainant warehouses for their patrons and that the payment of such allowances amounted to unlawful rebates. In this connection the Commission said:

> The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the con-

tract warehouses a part of the respective station facilities of these defendants at Philadelphia. (Report, page 569, R. 150.)

The report and order of the Commission were made by Division 3, Commissioners Aitchison and Porter. Petitions for rehearing by the full Commission were filed pursuant to sections 16a and 17(4) of the Act (R. 153, 156, 160, 167), and the matter received consideration by the full Commission, which denied the petitions (R. 177–178).

In the earlier case, *McCormick Warehouse Co.* v. *Pennsylvania R. R. Co.*, 148 I. C. C. 299, the Commission found discriminatory and unlawful the payment of allowances to a particular warehouse company at Baltimore under a state of facts practically identical with those in the case at bar. Its order in that case was upheld by the specially-constituted District Court for the District of Maryland (Circuit Judge Parker and District Judges Soper and Coleman), *Terminal Warehouse Company of Baltimore City* v. *United States*, 31 Fed. (2d) 951. No appeal was taken to this court in that case.

Proceedings in court below

The court below found and concluded that the payment of the allowances by the railroads, in accordance with the contracts, is unlawful in that it subjects the complaining warehouses to unjust discrimination in favor of the contract warehouses, gives an undue and unreasonable preference and

advantage to the contract warehouses, and subjects the complaining warehouses to an undue and unreasonable prejudice and disadvantage; that the allowances paid to the contract warehouses are unlawful as rebates; that the order of the Commission is in all respects a lawful order, and that the petitions should be dismissed. (See court's findings of fact and conclusions of law, R. 58–63.)

Final decree, dismissing the bills for want of equity, was entered November 19, 1930. (R. 95.)

Shortly after the rendering of the court's opinion on October 8, 1930 (Circuit Judge Buffington dissenting), petitions were filed for stay of the Commission's order pending appeal to this court. (R. 67, 857.) The United States, the Commission, and the six complainants, who had intervened in the court proceedings, filed answers in opposition. (R. 76, 81, 88, 860, 865.) November 19, 1930, the court rendered a supplementary opinion granting the petitions for stay (R. 92) and in its orders allowing the appeals of the three petitioners (R. 105–106; 821–822; 878–879) stayed the operation of the Commission's order pending the determination of the appeals by this court. From these stay orders cross appeals (Nos. 637, 640, 643) have been taken. (R. 108, 824, 881.)

The Commission's order was issued December 28, 1929, to become effective February 10, 1930. It's effective date was postponed by the Commission until February 25, 1930. (R. 9, 177.) Before it became effective, on February 21, 1930, the court,

after taking testimony showing the amounts of the allowances paid by the railroads to the appellants (R. 179–180), issued a temporary stay of the operation of the Commission's order for a period of sixty days (R. 18). April 15, 1930, the court extended that temporary stay until the further order of the court. (R. 29.) As a result of the various stay orders, the order of the Commission has not yet gone into effect.

SUMMARY OF ARGUMENT

STANDING TO MAINTAIN SUIT

I. None of the three railroads against whom the Commission's order is directed joined in the suits to set aside the order. The appellants have no standing to maintain an independent action for that purpose, for they have not shown that the order will deprive them of a legal right of their own. The order deprives them of only an economic advantage over their competitors equal to the amount of the allowances, given them by the carriers, not for "transportation" services performed, but only in consideration of their routing their traffic over the lines of the carriers giving the allowances. The effect of the order is only to require that their traffic be transported at rates equal to that of their competitors, without any refund, rebate or allowance. *Sprunt & Son* v. *United States*, 281 U. S. 249.*

* Decided Apr. 14, 1930, after these cases were heard and submitted to the court below on March 28, 1930, R. 2.

ON THE MERITS

I. The appellants and complainants, engaged as operators of merchandise warehouses, whose business it is to receive carloads of merchandise shipped to them for distribution or other warehouse trade services, and to forward shipments for others from their warehouses, in order to obtain the lower carload rates, are "persons" within the meaning of that word as employed in sections 2 and 3 of the Interstate Commerce Act and other acts regulating commerce. They are in the same category as "forwarding agents," who from an early date have been held to be "shippers" subject to those statutes. *Interstate Comm. Comm.* v. *Del., L. & W. R. R.*, 220 U. S. 235; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444. The allowances are paid to appellants only on shipments to and from their warehouses in connection with which they are employed by their customers to perform some warehouse service—business which they have obtained by their advertisements and solicitation. The fact that the shipments are billed in their care instead of to them by name is immaterial, for it is shown that the names used in the billing are those which the appellants themselves suggest. It is well settled that the actual situation underlying a shipment rather than recitals in the shipping documents control the application of the Acts of Congress. *D., L. & W. case, supra*, at pages 242–243; *United States* v. *Koenig Coal Co.*, 270 U. S. 512; *United*

States v. *Metropolitan Lumber Co.*, 254 Fed. 335; *B. & O. S. W. R. R.* v. *Settle*, 260 U. S. 166; *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 466.

It is unnecessary to determine whether appellants and complainants are technically "consignors" or "consignees" of the shipments to and from their warehouses, for sections 2 and 3 of the Act do not use those terms, nor the term "owner," but forbid carriers to discriminate against "any person" in respect of transportation. Hence, transportation of property for appellants at net rates lower than those charged for similar transportation for complainants, constitutes unjust discrimination in violation of the Act and within the jurisdiction of the Commission to correct.

II. Appellants' warehouses are not operated or used as public freight stations of the carriers. Appellants are engaged in the operation of storage and distribution warehouses located upon private premises, served by private sidetracks of the carriers. Their advertisements and letters of solicitation show their function in furnishing storage and distribution services to manufacturers, merchants and shippers, rather than the performance of common carrier duties. Appellants' assertion that they act as agents of the carriers in the operation of railroad freight stations is negatived by the fact that they are employed to assemble and distribute carload freight, to obtain the carload rate, which assembling and distribution work can not lawfully

be done by railroad agents at railroad stations because of the restrictions of classification rules 14 and 23. Printed circulars of instructions issued by the carriers list the appellants's warehouses as private business enterprises served on private sidetracks, and not as public freight stations. Shipments tendered at appellants' warehouses for transportation over the Pennsylvania Railroad were refused on the ground that the warehouses were not freight stations. Appellants are not authorized to issue bills of lading on behalf of the carriers. These facts differentiate the *Arbuckle case, United States* v. *B. & O. R. R.*, 231 U. S. 274. The Commission's finding of fact that the appellants' warehouses are not in fact open public freight stations of the railroads was sustained by the court below as supported by substantial evidence, and the statutory court in *Terminal Warehouse Co. of Baltimore City* v. *United States*, 31 Fed. (2d) 951, made the same finding under similar facts.

III. The Commission's finding that the payment of allowances to the appellants results in unjust discrimination and undue prejudice against the complainant warehouses is amply supported by substantial evidence. Voluminous evidence established that appellants and complainants are competitors in the merchandise warehouse business; that complainants have suffered prejudice which has been a source of positive advantage to the appellants; that the allowances have been used to divert business from complainants to appellants;

that the latter have been able to underbid complainants for new business, and to take customers away from complainants; that complainants have been compelled to reduce their normal warehouse charges in order to hold some of their customers under the disadvantage of the allowances, and, because of them, have never been able to obtain a fair proportion of the warehouse and distribution business in Philadelphia; that appellants have used the allowances for many years to build up their business and to suppress the development of the business of complainants, and when the allowances are eliminated the complainants will continue to suffer from the disadvantage because appellants will have the established trade, built upon the allowances, and it will require years for complainants to recover their fair share of the competitive merchandise warehouse business.

The backbone of the business of these merchandise warehouses in the traffic of large manufacturers that customarily use warehouse distribution service in marketing and distributing their goods in Philadelphia and other large cities. Illustrative of the similarity of the business of appellants and complainants is the fact that sometimes a large manufacturer will carry his "account" with a complainant warehouse and at other times with an appellant. When the account of such a manufacturer is carried with an appellant warehouse, the transportation service performed and the circumstances and condition surrounding the trans-

portation are not different than when the account is carried with a complainant warehouse. In either case the carrier transports the shipment and makes delivery upon the sidetrack of the warehouse which unloads, stores or distributes in accordance with the instructions of the shipper, paying or collecting the freight charges, sending notices of arrival to the shipper's customers, checking the contents of the cars, etc. In short, the record establishes that these several warehouse companies are engaged in the same kind of business, that each ships and receives at its warehouse in Philadelphia, to and from various points in the United States over the same railroads, the same kinds of goods, and that the circumstances and conditions surrounding the transactions are similar, if not identical.

IV. A carrier may not lawfully pay one shipper for transportation service and deprive another of compensation for similar service. Even if it be assumed, therefore, that the services appellants perform are transportation services, the payment of allowances to them and the withholding of allowances to complainants for similar service is an "undue" discrimination. *Union Pacific R. R.* v. *Updike Grain Co.*, 222 U. S. 215. While the decision in *Interstate Commerce Commission* v. *Diffenbaugh and Peavey*, 222 U. S. 42, apparently sustained the Union Pacific's exclusive contract with the Peavey elevators, that interpretation is inadmissible in view of the *Updike case*, relating to the same elevation situation at Omaha. Cases relied upon by ap-

pellants like *D., L. & W. R. R. Co.* v. *Morristown*, 276 U. S. 182, sustaining exclusive contracts between railroad companies and taxicab companies, baggage transfer companies and the like, are inapposite because those contracts were not made with shippers and did not relate to common carrier transportation duties. The *Arbuckle case, U. S.* v. *B. & O. R. R.*, 231 U. S. 274, and the *St. Louis Terminal Case*, 34 I. C. C. 453, are not controlling because the facts were different. But the Commission found that the services performed by appellants are not transportation services, and this finding of fact was sustained by the court below as supported by evidence. Cf. *L. & N. R. R.* v. *U. S.* (*Private Car Case*), decided Feb. 25, 1931.

V. Power to prescribe the reasonable and nondiscriminatory practice to be observed by a carrier to take the place of a practice found to be unjustly discriminatory is expressly conferred upon the Commission by section 15 (1) of the Act. The Commission's action in requiring that the discrimination here found should be removed by the carriers ceasing to pay the allowances to appellants was a proper exercise of this power because (1) the services performed by appellants, as well as complainants, are warehouse trade services for the performance of which they are entitled to no compensation from the carriers; (2) the allowances were given in consideration of the appellants causing their traffic to be routed over the lines of the respective competing carriers. Each of the con-

tracts provides that no allowances will be made to the warehouse company where the carrier has received only a switching haul in Philadelphia. In order to earn its allowance, the warehouse company must cause the shipment to be routed over the contracting carrier's line in a line-haul movement. Allowances for this purpose are unlawful rebates. *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444; *United States* v. *Union Stock Yards*, 226 U. S. 286, 307.

THE CROSS APPEALS

I. The court below erred in staying the operation of the Commission's order pending appeal. It was not shown that appellants would otherwise suffer irreparable injury. No bond was required by the court to indemnify the warehouse companies suffering the discrimination pending determination of the appeal. The finding of the District Court that the allowances were rebates should have precluded the issuance of a stay. The granting of the stay was contrary to the policy of the law to afford prompt relief in discrimination cases.

ARGUMENT

STANDING TO MAINTAIN THE SUIT

I

Appellants, having failed to show that the Commission's order will deprive them of a legal right of their own, are without standing to maintain an independent action to set aside the order

The opinion of the court below states:

> Although the railroads were defendants before the Interstate Commerce Commis-

> sion, they did not intervene in the instant proceedings and took no part through counsel or otherwise at the hearing and argument of the case. We must assume, therefore, that they are satisfied with the order requiring them to desist from the payments and to cancel their tariff provisions, not only those under which the payments are made to the petitioners, but those in which the petitioners' warehouses are designated as public freight stations. (R. 36.)

The appellant warehouses are in a position similar to that occupied by the appellants in *Sprunt & Son* v. *United States*, 281 U. S. 249, 254–255. Here, as in the *Sprunt case*, the order, in so far as it directs elimination of the rate differential (caused by the payment of the allowances), worsens the economic position of the appellant warehouses, for it deprives them of an advantage over their competitors of amounts equal to the allowances. The enjoyment of this advantage, which was threatened, gave them a distinct interest in the proceedings before the Commission under sections 2 and 3 of the Act. Having this interest, they were entitled to intervene in that administrative proceeding. And, having done so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit "wherein is involved the validity" of the order entered by the Commission. "But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper

only where a right of his own is alleged to have been violated by the order." (*Ibid.* 255.)

It is urged in behalf of appellants that their rights arise not under the Interstate Commerce Act but independently thereof, and they point to their contracts with the carriers. But the Commission has made no adjudication as to the contracts. It has found that the payment of the allowances, provided by the contracts, results in unjust discrimination in favor of appellants and against their competitors, who were complainants before the Commission, and has ordered the carriers to remove the discrimination, not by extending the allowances to complainants but by ceasing to pay them to appellants. The situation would be no different if the allowances were paid to appellants without contracts. Appellants can not be given any rights by contract in derogation of the Interstate Commerce Act. *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, and other cases cited, *infra,* page 86.

The Commission has determined purely an administrative question, a question of fact, as to whether the unjust discrimination alleged in the complaints exists. As an incident of that determination it was required to ascertain whether certain services performed by appellants and complainants including loading and unloading carload

freight were transportation services for the performance of which allowances were lawfully payable under section 15 (13) of the Interstate Commerce Act. But this, too, was an administrative question, which like the problems presented in *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43, and *Director General* v. *Viscose Co.*, 254 U. S. 498, referred to more fully hereinafter, page 73, was one directly concerning rate making. For, if the appellants performed no transportation services, but only warehouse trade services, it would follow that the payment of allowances to them would result in the collection of net rates for their transportation lower than the tariff rate.

The case at bar is different from the *Diffenbaugh case,* 222 U. S. 42. As pointed out in footnote 5, page 257, of the *Sprunt* decision, "two suits were involved in the *Diffenbaugh case.* One was against a carrier to recover allowances for substituted transportation facilities alleged to be due under section 15 (13) of the Act. The Interstate Commerce Commission was joined and its order prohibiting the allowances sought to be enjoined because the order would otherwise have constituted a defense to the suit. In the other action, interested carriers intervened as parties plaintiff and persisted in their effort to set aside the order." Here no suit against the carrier to recover allowances is

involved, and the interested carriers have not intervened or made any effort to set aside the order. Here the alleged transportation services performed are not for elevation of grain in transit which was expressly declared by Congress after long consideration to be a transportation service, but primarily for loading and unloading carload freight, a service almost universally performed by shippers and receivers without allowances from the carriers. See *infra*, pp. 71–76.

In the *Sprunt case* the court held that the case had become moot by the acquiescence of the carriers in the Commission's order. The case at bar does not appear to be moot. But the mootness of the *Sprunt case* was a second reason why it could not be reviewed in this Court; that phase of the case did not affect the holding that the appellants had no standing to maintain the suit because of lack of actual or threatened legal injury. (Compare *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479.

The right of the Commercial Exchange and other Philadelphia trade bodies who intervened in the court below in support of the petitions of the appellant warehouses, and which have joined with them in the appeals in Nos. 636, 639, and 642, would seem clearly to depend on the right of the appellant warehouses to maintain their appeals.

ON THE MERITS

I

The appellants and complainants were shown to be persons within the meaning of that term as used in sections 2 and 3 of the interstate commerce act. Hence, the transportation of property for appellants at net rates lower than those charged for similar transportation for complainants constitutes discrimination in violation of those sections

Appellants contend they are not the consignors, consignees, or owners of the freight, for the loading and unloading of which they are compensated by the carriers, have no dominion over the transportation, and act merely as the agents of the carriers for performing a transportation duty.

But the evidence is clear that the allowances are paid to appellants only on shipments to and from their warehouses in connection with which they are employed by their customers to perform some warehouse service—business which they have obtained by their advertisements and solicitation. When they receive an inquiry from a prospective customer, they write to him, quoting their rates and giving instructions as to the billing and routing of the shipments. For instance, the Merchants Warehouse Co., in a letter to a machinery manufacturer at Chicago, wrote (Ex. 6, R. 549–550):

> If you will bill your shipments for delivery to us via the Pennsylvania Railroad, the cars will be placed on our sidings with-

> out your incurring any additional expense in the nature of drayage, switching or handling charges.

A letter to a stove company at Milwaukee (Ex. 6, R. 550–551) advised:

> Our warehouse is served by the Pennsylvania Railroad, enabling us to receive carload lots over that road without cartage, and to ship either in carload or L. C. L. lots to any point reached by the Penna. Railroad, without cartage or extra costs to you.

In answer to a letter "as to storing and distributing" corn sugar in carload lots, the warehouse company instructed:

> Cars should be consigned to yourself c/o Merchants Warehouse Co., River Front Stores, Phila. Penna. R. R. dely. (Ex. 6, R. 552–553.)

The evidence shows conclusively that all the inbound freight handled at appellants' warehouses, on which they receive allowances, are shipments which have been *consigned* to them in this manner,[10] that is to say, shipments which have been shipped to the warehouses, in pursuance of an understanding

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[10] As to Merchants Warehouse Co.: R. 189, 192, 196–198, 351, 375, 376, 378, 379, and stipulation of counsel, R. 233, 338.

As to Pennsylvania Warehousing & Safe Deposit Co.: R. 306; Exs. 42–47, R. opp. 596, and stipulation of counsel, R. 312, 315.

As to Philadelphia Warehousing & Cold Storage Co.: Ex. 50; R. opp. 598.

or agreement previously entered into between the warehouses and the customer such as reflected by the above-mentioned letters, consigned either to the warehouse company by name, or in some other name, frequently the name of the shipper, *in care of* the warehouse.

The outbound shipments, on which appellants receive allowances, may be less-than-carload lots, shipped in the process of distribution, from spot stocks in their warehouses, or carload shipments made up by assembling numerous l. c. l. lots. (Exs. 2, 3, 41, 49; Ex. 12, R. 558–560; compare Ex. 37, R. 572–574.)

Usually, continuing agreements are made with large manufacturers or producers[11] for shipping activities such as described in the following testimony:

> For instance, one of our customers is Colgate & Company, soap manufacturers, whose plant is located at Jersey City, New Jersey, who ship their various products to us in carload lots at carload rates by railroad. They mail us a manifest which indicates the contents of the car, both as to count and product. This manifest is turned over to our Traffic Department, who immediately trace the movement of the cars with the railroad to expedite delivery if possible. Disposition instructions on all or part of the contents of

[11] See Ex. 5, R. 548–549; Ex. 30, R. 563–564; Ex. 48, R. 597; Ex. 18, and R. 269–275.

> the car are also received by us from Colgate & Company prior to the arrival of the car. That portion of the carload which is not delivered in L. C. L. lots immediately upon arrival of the car is placed in storage awaiting future withdrawal orders, which are usually given to us by the local sales representative of the manufacturer. We deliver this soap locally and to nearby suburban points, and some is shipped by railroad or motor truck in less-carload lots to points in New Jersey, Pennsylvania and Delaware. This manufacturer will keep shipping his soap to us in carload lots at carload rates throughout the year, always keeping sufficient stock on hand to meet the immediate needs of customers in this territory, and thus be able to compete with soap manufacturers whose plants are located in Philadelphia. (R. 270.)

Railroad transportation is essential to the existence of both appellant and complainant warehouses, the local business in Philadelphia not being sufficient to enable them to operate at a profit. (R. 187, 210, 218–219, 234, 243, 251, 266 et seq., 303–306, 309–311; Ex. 36, R. 571; Ex. 37, R. 572–590.)

The extent of appellants' shipping activities is illustrated by the following testimony of the Merchants Warehouse Company's superintendent:

> Freight is shipped inbound to these warehouses over the Pennsylvania Railroad, the quantity depending on the size of the ware-

> house; the small warehouses get a small amount and the larger warehouses get considerable. Freight is also shipped outbound over the Pennsylvania Railroad. We get materials from pretty nearly every state in the United States; and it goes out that way—we ship all over the country. (R. 187.)

It seems unnecessary to determine whether the appellants and complainants are technically and legally "consignors" or "consignees" of the shipments to and from their warehouses. For sections 2 and 3 of the Interstate Commerce Act do not use those terms, nor the term "owner," but make it unlawful for a carrier to discriminate against "any person or persons," and prohibit carriers from giving undue preference or advantage to "any particular person, company, firm, corporation, or locality," in respect of transportation. Therefore, if the appellants and complainants are "persons" within the meaning of that term as used in sections 2 and 3, the transportation of property for appellants at net rates lower than those charged for similar transportation for complainants, constitutes discrimination in violation of the Act and within the jurisdiction of the Commission to correct.

It has long been settled that persons engaged, like appellants and complainants, in the business of shipping and receiving freight for others, are persons within the purview of sections 2 and 3.

Interstate Comm. Comm. v. *Del., L. & W. R. R.*, 220 U. S. 235, had to do particularly with forwarding agents, "who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments" The carriers had sought to exclude forwarding agents and others likewise engaged from the benefit of the carload rate by providing in their schedules to the effect that the carload rate would be applied only where the consignor or consignee was the actual owner of the goods in the car. The court held that a carrier can not make mere ownership of goods tendered for transportation the test of the duty to carry, nor discriminate in fixing charges for carriage upon such ownership.

The court further held that persons engaged in business of that character are "persons" within the meaning of that word as employed in the second section of the Interstate Commerce Act. Indeed, the court said it was settled in England prior to the passage of the Act to regulate commerce, that the Equality Clause of the English Act, from which the provisions of section 2 of the Act to regulate commerce were substantially taken, "forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others."

It may not be doubted that the same holding would apply to any persons, groups of persons, or organizations who engage in the same business.

The opinion indicates that storage and other companies, as well as the so-called forwarders, did so engage (pages 242–243):

> There can be no doubt that the privilege of shipping at a lesser rate for the carload shipment than was asked for a less than carload shipment came to the interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association and to aggregate and ship them in carload lots in the name of one consignor to a single consignee at one destination by the use of commission houses, storage and other companies, etc.

In *Great Northern Ry Co.* v. *O'Connor*, 232 U. S. 508, the appellee employed a forwarder to ship a less-than-carload lot of property consisting of a typewriter, wearing apparel and other personal effects. The forwarder loaded the goods in a car along with household goods, shipped the car as emigrant movables and in order to obtain the lower of two carload rates, stated the value as not exceeding $10 per cwt. The goods were lost and

O'Connor sued the carrier for the full value. The court held that the carrier was obliged to treat the forwarder as shipper, following the *D. L. & W. case,* and that—

> If the Forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable.

In other words, the forwarder was shipper for all purposes. O'Connor, the owner of the goods, was not the shipper, and had no privity with the carrier. And it was held that O'Connor could not recover from the carrier, but "if there was any undervaluation, wrongful classification or violation of her instructions [to the forwarder] resulting in damage," O'Connor had her remedy against the forwarder.

In *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 444, a case brought under the Elkins Act, the court said that "as toward the railroad, George W. Sheldon & Company [a freight forwarder] is consignor and consignee, and although it may be in no case the owner, that does not concern the appellant. Upon the admitted facts there can be no doubt, and it is not denied, that it is, to all legal intents, the shipper of the goods."

The *D. L. & W. case, supra,* sustained the Commission's ruling in *California Commercial Assn.* v.

Wells Fargo & Co., 14 I. C. C. 422, in which the Commission said, at 427:

> The carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. To veer from this straight course, no matter how slight a degree or for what apparently beneficial purpose, is to lead away from the policy of the law which condemns discriminations and preferences.

In *United States* v. *Milwaukee Rapid Transit Co.*, 145 Fed. 1007, it is said at page 1012:

> And if an owner [of property shipped], having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper.

In *Terminal Warehouse Co.* v. *United States*, 31 Fed. (2d) 951, 959, the statutory court sustaining the Commission's order in the *Baltimore warehouse case* said:

> We think that the decisions of the Supreme Court cases in which it is held that carriers may not lawfully discriminate for or against forwarders of goods are pertinent to this case. [Citing the *D. L. & W.* and *Lehigh Valley* cases *supra.*] Both the

warehouse and the forwarder solicit and obtain the transportation of goods. The forwarder is concerned with the assembling of goods into carload lots at the point of shipment and the carriage of the same to one consignee, who may be the forwarding agent himself, and who receives the goods and distributes them to the parties for whom they are intended. The warehouseman is chiefly concerned with the receipt and distribution of goods from the carrier after they have reached their destination. It is true that the forwarder is usually the consignor or the consignee of the goods, and it may be conceded *arguendo* that the warehouse company in this case is not. But both are closely related to the carriage of the goods and to the carrier, and both are entitled to the protection of the statute.

Under these authorities, merchandise warehouses, engaged as actual forwarders of freight from the warehouses and recipients or interceptors of inbound carload freight as a necessary agency in order to secure the application of the carload rate where otherwise the higher less-than-carload rates would be applicable, are "persons" within the meaning of sections 2 and 3 of the Act and are to be treated as "shippers" for the purpose of applying the provisions of that statute and the Elkins Act.

No reasons appear to warrant an interpretation of the regulatory statutes so narrow as to exclude merchandise warehouses from their purview.

They are in the same category as forwarding agents. Such warehouses are located in all parts of the United States (Ex. 4, R. 531) and evidently control an enormous traffic. It is obviously important to the proper administration of the law that these large shipping agencies be held to be within and subject to the provisions of those statutes. Otherwise all the evils denounced by them, including discriminations, rebates, false billing, false claims, undervaluing (compare *O'Connor case, supra; Mo. Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 671), may be committed by them without fear of punishment. At the same time they are entitled to the protection of the statutory prohibitions against unreasonable rates and discriminatory and preferential practices.

1. The manner in which the shipments are billed is immaterial, being a matter of form not affecting the substance of the transactions

Under the authorities cited above it would seem quite immaterial what names are used in shipping the carload lots. In the *D. L. & W. case,* as quoted above, it is stated that the forwarder or shipping agency shipped the goods in carload lots "*in the name* of one consignor to a single consignee"; and on page 243, where the forwarding agent's business was described, it is said the carloads were shipped "*in the name* of the forwarding agent, or of the owner of one of the less-than-carload shipments, to one consignee, who may be the forwarding

agent himself, another forwarding agent at the point of destination with whom he has business relations, or of the owner of a part of the property transported. The consignee of the shipment, *whoever he may be*, receives the carload and distributes its contents to the parties for whom they are intended." (Italics ours.)

As indicated by the letters quoted from above, the warehouse generally instructs the shipper to bill the shipments to himself c/o the warehouse. If the shipper fails to do so and instead names only the warehouse as consignee (compare R. 279) under appellants' theory the warehouse is then the "consignee," but, under their theory, if the shipper in compliance with the instructions uses the "care of" billing the warehouse is not the consignee. It seems clear that an inconsequential change in the manner of billing does not affect the substance of the transaction. (See R. 233–234; 283, 375–376; Ex. 38c, R. 594–595; Exs. 38, 38a and 38b, R. 590–594; Ex. 62, R. 703.)

As stated by the court below (R. 41–42), "while the billing in the instant case did not name the contract warehouses as consignors or consignees and the documents in consignments were made out 'in care of' the warehouses, it is inconceivable that the mere wording of the shipping documents can justify a course of action which would otherwise be contrary to law." (Citing *Terminal Warehouse Co.* v. *United States, supra,* 31 Fed. (2d), at page

959.) It is settled that the actual situation underlying a shipments rather than recitals in the shipping documents control the application of the Acts of Congress. *D. L. & W. case, supra; United Sttaes* v. *Koenig Coal Co.*, 270 U. S. 512; *United States* v. *Metropolitan Lbr. Co.*, 254 Fed. 335; *B. & O. S. W. R. R.* v. *Settle*, 260 U. S. 166; *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 466.

II

Appellants' warehouses are not operated or used as public freight stations of the carriers

From the facts already stated it is clear that appellants are engaged in the operation of storage and distribution warehouses located upon private premises, served by private sidetracks of the carriers. (R. 187, 302, 309, 311; Ex. 100, R. 745, 751–752; Ex. 101, R. 764, 771–772; Ex. 102.) The exhibits, to which reference has already been made, showing the advertisments of appellants' business and the actual solicitation of business by them establish the fact that their function is furnishing storage and distribution services to merchants, manufacturers, and shippers, rather than the performance of common-carrier duties. (R. 194.) Those exhibits, and, indeed, the testimony throughout the entire record, show that appellants' warehouses are in fact used only by the persons, companies, and firms from whom appellants have suc-

ceeded in soliciting merchandise for storage and distribution.

None of the contracts provide that the appellants' warehouses are to be operated as public freight stations of the carriers. They contemplate their operation as warehouses only. The evidence, as a whole, in the judgment of the Commission and the court below, has established that those warehouses were devoted to the exclusive use of the appellants in carrying on their private business dealings with their patrons.

The burden of defending the allowances on the ground that they were compensation for operation of railroad stations was assumed by the carriers and the appellants in the Commission proceeding. The evidence in behalf of the Merchants Warehouse Co. is embraced in the testimony of witness Henry, its superintendent (R. 186–199), and witness Richardson, its general manager (R. 374–398, 439–440, 452). Witness Henry, after testifying in general that the services performed by his company for its various patrons was the receipt of their goods, in carloads, and the distribution of them in l. c. l. lots (R. 186–191), sought to indicate that this distribution was performed "exactly in the same capacity as a railroad freight station, as an agent of the carriers." But he was unable to specify any published railroad tariff "authorizing that distribution of carload freight at the railroad freight stations." (R. 191.)

Indeed, the tariffs of all the carriers expressly provide to the contrary. Rules 14 and 23 of the Consolidated Classification (Ex. 33, R. 567), to which classification all three of these carriers are parties (R. 697, 708, 710), and to which none of them publish any "exceptions," prohibit carriers' agents from assembling or distributing freight carried at carload rates. For this reason, assembling and distribution work, such as performed by all the appellants at their warehouses, can not lawfully be done by railroad agents at railroad freight stations. To do so would be a misdemeanor, constituting a failure strictly to observe the published tariffs, in violation of sections 6 (7) and 10 (1) and (2) of the Interstate Commerce Act and section 1 of the Elkins Act.

It is primarily because of the restrictions of these rules that merchandise warehouses are employed for distribution service, as fully explained at R. 215–216 and 427–429. (Compare *Int. Comm. Comm.* v. *Del., L. & W. R. R.*, 220 U. S. 235, 245–246, and see page 14 of the Department of Commerce's publication, "The Merchandise Warehouse in Distribution," Ex. 18, in reference to these rules.)

Witness Richardson introduced in evidence the documents covering three typical shipments to his warehouse. (Exs. 90, 91, 92.) These were carload shipments of canned vegetables from Newark, N. Y., canned beans from Hoopeston, Ill., and

ginger ale from Hudson, N. Y. The contents of these typical cars (R. 378) were distributed to various persons and companies, in small l. c. l. quantities, by the warehouse, in accordance with the orders of the warehouse patrons which are included among the documents (R. 378–379). Those exhibits portray warehouse distribution service similar to the warehouse activities of complainants. Witness Richardson testified that 744 cars were loaded and shipped by his company in a certain period, the ladings of which had been previously delivered to the warehouses by trucks, or previously stored in the warehouses by the owner, but did not state that the owners of the freight loaded into those cars were not patrons of the warehouse. (R. 452.) Appellants did not name a single shipper who has ever used their warehouses unless he employed their storage, distribution, or assembling services. While the credibility of witnesses and the weight of and conflicts in the evidence are matters left to the Commission, *Interstate Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92, 100; *United States* v. *L. & N. R. R.*, 235 U. S. 314, 320; *Assigned Car Cases*, 274 U. S. 564, 580–581, it would seem that from such evidence the Commission could not have found that appellants' warehouses are used as railroad freight stations at which any shipper, not desiring appellants' warehouse services, could tender and receive carload shipments to and from carriers.

The testimony of witness Justice, for the Pennsylvania Warehousing & Safe Deposit Co. (R. 301–309, 398–403), witness Funck for the Pennsylvania Railroad Company (R. 318–357), witness Gheen for the Reading Company (R. 357–364), and witness Settle for the Baltimore & Ohio R. R. (R. 364–368) also fail to show that appellants' warehouses are devoted to public use in the service of the railroad companies and not to the private business of the warehouse companies. If appellants' warehouses were actually used as railroad freight stations it seems that ample evidence in the form of bills of lading, shipping orders, waybills, freight bills, etc., covering numerous transactions for the railroad companies and the testimony of shippers that they had used such stations without employing appellants' warehouse services, could have been readily produced.

The evidence in rebuttal, showing appellants' warehouses are private business enterprises and are not railroad stations is clear and convincing.

It was proved conclusively that all shipments inbound to appellants' warehouses are billed to those warehouses either by name or in their care.[11] Those shipments were billed in that manner by the consignors in response to letters of solicitation sent

[11] As to Merchants Warehouse Co.: R. 189, 192, 196–198, 351, 375, 376, 378, 379, Ex. 6, R. 550, 553, and stipulation of counsel, R. 283. As to Pennsylvania Warehousing & Safe Deposit Co.: R. 306, Exs. 42–47, R. opp. 596; stipulation of counsel, R. 312, 315. As to Philadelphia Warehousing & Cold Storage Co., Ex. 50, R. opp. 598.

out by the appellants.[17] That inbound traffic, therefore, was traffic which the appellants elected to handle in carrying on their private business activities and was not freight traffic committed to the appellants by the railroads for handling in railroad service.

The railroad companies issued printed circulars of instructions to guide their yard and station employees in the handling of shipments at Philadelphia.[18] (R. 353, 363, 373.) Those circulars listed the public freight stations of the railroads and the private business enterprises served on private side tracks. Appellants' warehouses, like the warehouses of the complainants, are listed in those circulars not as public freight stations, but as the facilities of private business enterprises served on private or individual side tracks. These records, used for years to guide the railroad employees who actually control and direct the movement of loaded and empty cars at Philadelphia, negative the assertion of the use of appellants' warehouses as public freight stations.

James Gallagher, one of the complainants before the Commission, operator of Gallagher's warehouse, who has also conducted a trucking business in Philadelphia for many years, trucking freight

[17] Ex. 6, R. 549–558; Exs. 42–47, R. opp. 599; Exs. 50–51, R. opp. 598.

[18] Circular F. D. 199 of the Pennsylvania R. R., Ex. No. 100, R. 745–763; Circular 225 of the Reading Co., Ex. No. 101, R. 764–774; Circular F. D. 799 of the B. & O. R. R., Ex. No. 102.

to and from railroad stations and warehouses, and therefore fully conversant with public freight stations in railroad service and warehouses at Philadelphia, testified that appellants' warehouses are not public freight stations in railroad service. (R. 423–427.) Another experienced truckman testified to the same effect. (R. 434–435.) The absence of advertisement of the appellants' warehouses as freight stations, such as the railroads use in connection with their actual stations, was disclosed. (R. 440–442; R. 429–430; compare R. 355.) Shipments, tendered for transportation over the lines of the Pennsylvania Railroad, by being offered for shipment at two warehouses of the Merchants Warehouse Company were refused by employees of that company. These shipments were refused on the sole ground that the warehouses were not freight stations. (R. 435–436; 437–439.)

Appellants are not authorized to issue bills of lading on behalf of the carriers. When an outbound shipment is to move from their warehouses, they must obtain a bill of lading from the railroad agent, as other shippers do. (R. 385–386.)

The evidence referred to above, together with many inferences which the Commission could draw from the record as a whole (*O'Keefe* v. *United States*, 240 U. S. 294, 303), support the Commission's finding of fact that appellants' warehouses "are not in fact public stations," and differentiate *United States* v. *Balt. & Ohio R. R. Co.*, 231 U. S.

274, known as the *Arbuckle case,* where the contracts expressly provided for the operation by Arbuckle Bros. of a public freight station, known as the Jay Street Terminal, and where Arbuckle Bros. actually operated a union freight station for the several railroad companies whose lines reached greater New York, and at which freight for the general public was received and delivered, bills of lading issued, etc.

The court below found that "there is substantial evidence to support the facts found by the Commission that the warehouses of the plaintiffs (appellants) are not in fact open public freight stations of the railroad"; (R. 41) and the Maryland Court in the Baltimore warehouse case made the same finding under similar facts (R. 37–38.)

III

The Commission's finding that the payment of the allowances to the appellants results in unjust discrimination and undue prejudice against the complainant warehouses, is amply supported by substantial evidence

1. Complainants have suffered prejudice which has been a source of positive advantage to the appellants

Voluminous evidence was submitted to the Commission developing in detail the prejudice and disadvantage suffered by the complainants and the positive advantage and preference enjoyed by appellants because of the payment of the allowances to the latter. This evidence establishes that the al-

lowances have been used to divert business from complainants to appellants (R. 276); that the latter have been able to underbid complainants for new business, and to take customers away from complainants (R. 276); that complainants have been compelled to reduce their normal warehouse charges in order to hold some of their customers under the disadvantage of the allowances (R. 276–277), and, because of them, have never been able to obtain a fair proportion of the warehouse and distribution business in Philadelphia (R. 281–282); that appellants have used the allowances for many years to build up their business and to suppress the development of the business of their competitors, and when the allowances are eliminated the complainants will continue to suffer from the disadvantage because appellants will have the established trade, built upon the allowances, and it will require years for complainants to recover their fair share of the competitive merchandise business (R. 281).

Illustrative of this evidence is the testimony of Witness Sullivan, Vice President and General Manager of the Terminal Warehouse Company, who named the warehouse companies that receive allowances (the appellants), stated that the Terminal is a competitor of each of them, and explained the use of the allowances to divert business from the Terminal to its competitors:

> There are hundreds of well known concerns that employ warehouses to distribute

> their products in the Eastern cities. We and the subsidized [contract] warehouse companies actively compete in soliciting the business of those concerns. Those concerns ship their goods to the warehouse that can offer them the lowest aggregate charge for the distribution of their goods. The aggregate charge is made up of the railroad freight rates to the warehouse and the warehouse charges. Our subsidized competitors are enabled, by the allowances, to quote lower aggregate charges than we can quote, and they underbid us and take competitive business away from us. (R. 276.)

Specific instances of that underbidding were given (R. 276; and see Exhibits 19–29, R. opp. 562); and a number of former customers, mostly large, nationally-known manufacturers, whose business had been secured by the appellants by reason of the allowances, were named. (R. 276.)

The additional freight charge paid by the Terminal over and above that paid by the appellants, can not be passed on to its customers. "We can not pass it on to any person. When we do not, or can not, shrink our aggregate charge to reflect the allowance, the outside concern will not give us his business. In such case he gives his freight to the subsidized warehouse companies who underbid us." (R. 281.)

Due to the handicap of being forced to compete with warehouses who receive allowances from the railroads for the unloading of cars, amounting in

many instances to as much as $15 per carload, the Terminal was never able to obtain a fair proportion of the warehouse and distribution business of Philadelphia. (R. 281, 282.) How the Terminal was deprived of reasonable opportunity to handle certain commodities under the competition of the appellants was described:

> The storage and distribution of flour is controlled by the subsidized warehouses solely by reason of the unloading allowance granted to them by the railroads. This allowance enables the subsidized warehouse to totally eliminate handling and storage on all that portion of the cars that is delivered within the first 48 hours after the cars' arrival at the warehouse. In the case of flour they also eliminate any handling charge on that portion of the carload going into storage and eventually delivered in l. c. l. lots. In soliciting these flour accounts for storage and distribution, we were told that the construction of our warehouses and their locations were ideal for the flour trade, but that they would be unable to give us any business unless we were willing to meet the rates and extend the free handling privilege granted to the flour trade by the subsidized warehouses.
>
> In former years we handled thousands of bales of cotton linters annually through our warehouses at rates that were only nominally compensatory. However, about four years ago the Merchants Warehouse Company

started a drive for this class of business and quoted rates approximately 50 per cent less than our charge. They were able to do this only because of the allowance they received from the railroads. Being unable to meet the rates of the subsidized warehouses, the Terminal Warehouse Company has lost this business entirely.

It is absolutely futile for the Terminal Warehouse Company to solicit the storage and distribution of broom corn and feed as the jobbers or dealers in these products are in many cases able to distribute the entire carload within 48 hours of the arrival of the cars at the subsidized warehouse and do not have to pay one cent for all the clerical and physical labor necessary to properly distribute this merchandise because the subsidized warehouses receive their recompense out of the unloading allowance paid them by the railroad companies. (R. 282–283.)

Witnesses on behalf of each of the other complaints testified to the same effect. (R. 202–211; 222–226; 236–237; 243–244; 251–253.)

2. A competitive relation exists between the appellants, who are the recipients of the preference, and the complainants, who suffer the prejudice

That the complainants and the appellants are competitors for the merchandise warehouse business of Philadelphia has already been indicated. Witnesses for each of the six complainants specifically so testified. (R. 205, 222, 236, 243, 252, 275–276.)

The cold storage warehouses require special mention. The appellant Philadelphia Warehousing & Cold Storage Company is engaged in both cold storage warehousing and merchandise warehousing. (R. 309–311.) The Industrial Cold Storage & Warehouse Company, complainant, is also engaged in both cold storage and merchandise warehousing. (R. 234, 239.) These two warehouse companies specialize in the handling of food products requiring cold storage. (R. 235, 309.) The merchandise warehouses handle many of such food products during the cooler months and, therefore, they compete with the cold storage warehouses. (R. 205, 237, 239.) Like the merchandise warehouses, the cold storage operators make distribution in small lots of products shipped to them as carloads at the carload rate. (R. 236, 311, Ex. 49.) Hence, what is said herein in reference to merchandise warehouses is applicable to the cold storage concerns.

3. The circumstances and conditions surrounding complainants' traffic are substantially similar to those surrounding appellants' traffic

The backbone of the merchandise warehouse business is the traffic of prominent business concerns that customarily use warehouse distribution service in marketing and distributing their goods in Philadelphia and other large cities. (Ex. 30, R. 563–565, is a list of such concerns; compare Ex. 4, R. 531.) When they decide to market their goods in cities other than that in which their plant

is located, they make a continuing arrangement with some warehouse company to receive the carloads of their products, store as to marks, grades, sizes, etc., and have them available for immediate demands from their customers in comparatively small lots. (R. 428.)

The evidence is clear that appellants are engaged as operators of distribution warehouses. The testimony of the superintendent of the Merchants Warehouse Co. (R. 186–192), of the general superintendent of the Pennsylvania Warehousing & Safe Deposit Co. (R. 305), and of the president of the Philadelphia Warehousing & Cold Storage Co. (R. 311), read in the light of the advertisements and letters of these concerns, leaves no room for doubt on this score.

So similar are the services these respective Philadelphia warehousemen offer to the public that many of such large concerns carry their "acounts" sometimes with one or another of the appellants' warehouses and at other times with one or another of the complainant warehouses. (R. 276, 286–288; compare Exs. 19–29, R. opp. 562.) For instance, the J. C. Hubinger Bros. Co., manufacturers of "Elastic Starch" and other corn products, with a factory at Keokuk, Iowa, formerly carried its account with the Terminal Warehouse Co. but now carries it with the Merchants Warehouse Co. (R. 276.) On October 15, 1925, that manufacturer

wrote the Terminal Warehouse Company as follows (Ex. 24, R. following 562):

> * * * we have arranged to send any future cars going to Philadelphia to another warehouse for the reason that we have been able to secure a better rate for storage and we are promised the same prompt attention by this other warehouse that we have received from you.
>
> Your services which you have rendered toward this company in regard to handling our account, has been very good and as stated above, the only reason that we considered making a change was because of our being able to secure the same kind of service at a cheaper storage rate.

When this account was carried with the Terminal Warehouse Company the service rendered by the Pennsylvania Railroad was not different than it was when later the account was transferred to the Merchants Warehouse Company. For the Terminal, the Pennsylvania transported the carloads to Philadelphia and made delivery by spotting them on the Terminal's private sidetrack. Thereupon, the latter broke the seals, etc., unloaded the car, and followed the instructions of the shipper as to storage, distribution, etc. (R. 270–275.) For the Merchants, the Pennsylvania likewise transports the cars and makes delivery by placement on the private sidetrack of the warehouse, whose employees unload the car and store or distribute the

contents in accordance with the owner's instructions. (R. 186–192.) For the service of unloading and other incidental services in connection therewith, the Pennsylvania pays an allowance to the Merchants but refunds nothing to the Terminal, although the latter performs every service that the Merchants does.

The evidence is clear that the Terminal, the Merchants, and all the other complainants and appellants, load and unload their freight, pay and collect freight charges, send "notices of arrival" to their customers, check the contents of the cars, give the railroad a report, notify railroad of damage to the freight, prepare bills of lading, mark and stencil packages, recooper, give 48 hours free time, etc. (R. 203–204; 219–220; 235–237; 252–253; 270–272; 274; 278–279; 431–432.)

All of these services, "including the loading of freight into railroad cars and the unloading of freight from railroad cars, are warehouse trade services which are performed by all merchandise warehouses under the terms of their contracts and arrangements with the manufacturers and wholesalers." (R. 274.) Part V, *infra*, deals with this subject more fully.

In short, the record establishes that these several warehouse companies are engaged in the same kind of business, that each ships and receives at its warehouse in Philadelphia, to and from various points in the United States over the same railroads, the

same kinds of goods, i. e., package freight of all kinds except articles of an inflammable or explosive character,"[14] and that the circumstances and conditions surrounding the movement of this traffic are similar, if not identical.

IV

A carrier may not lawfully pay one shipper for transportation service and deprive another of compensation for similar service. If it be assumed that the services appellates perform are transportation services, the payment of allowances to them and the withholding of allowances to complainants for similar services is an "undue" discrimination

Appellants contend that the loading, unloading, and other incidental services they render are transportation services as defined in section 1 (3) of the act, which the carriers are under legal obligation to perform, that the allowances are compensation for those services, and that the carriers have appointed appellants their agents for the performance of those services. And while they admit they have an advantage, they claim it is only an incidental one, the discrimination as a matter of law being not undue, because the carriers may employ them

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[14] Complainants: Walter A. Bailey, R. 204; Northeastern Warehouse Co., R. 218–221, 225; Rex & Co., R. 243; Industrial Cold Storage & Warehousing Co., R. 235; Gallagher's warehouses, R. 251–252; Terminal Warehouse Co., R. 266, 269, 275.

Appellants: Merchants Warehouse Co., R. 187; Pennsylvania Warehousing & Safe Deposit Co., R. 304–305; Philadelphia Warehousing & Cold Storage Co., R. 309–311.

to the exclusion of others for performance of transportation duties.

But even if it be assumed, *arguendo*, that these services are transportation services, the payment of allowances therefor to appellants and the withholding of similar payments to complainants, who perform the same services under similar circumstances, is an "undue" discrimination, violative of sections 2 and 3 of the act, under the holding in *Union Pacific R. R.* v. *Updike Grain Co.*, 222 U. S. 215. In that case it was shown that the Union Pacific paid allowances to the Peavey elevators for elevating grain in transit, while denying allowances to the Updike Grain Company for performing the same service, through the enforcement of an arbitrary and unreasonable rule. The Commission found this to be an unlawful discrimination. The Court, sustaining the Commission's order, held:

> The carrier can not pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This can not be directly done, nor indirectly by means of

regulation. A rule apparently fair on its face and reasonable in its terms may in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated can not avail himself. (*Ibid.*, 220.)

The Commission has held to the same effect as the *Updike case* in a great many cases, including *Industrial Railways Case*, 29 I. C. C. 212; *Suffern Grain Co.* v. *Ill. Cent. R. R.*, 22 I. C. C. 178; *Pittsburgh Steel Co.* v. *P. & L. E. R. R. Co.*, 39 I. C. C. 312; *Westport Stone Co.* v. *C., C. C. & St. L. Ry. Co.*, 48 I. C. C. 637; *National Malleable Castings Co.*, v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537; *Sharon Steel Hoop Co.* v. *Penna. Co.*, 51 I. C. C. 454; *Pittsburgh Plate Glass Co.* v. *Director General*, 58 I. C. C. 81; *Buckeye Steel Castings Co.* v. *Hocking Valley R. Co.*, 58 I. C. C. 500.

Interstate Commerce Commission v. *Diffenbaugh and Peavey*, herein called the *Peavey case*, 222 U. S. 42, relied upon by appellants, related to the same elevation situation at Omaha as the *Updike case*. In the beginning the Union Pacific made an exclusive contract with Peavey & Co. for elevation of grain in transit. The decision of this court in the *Peavey case*, standing alone, apparently sustained the exclusive contract, but that interpretation is inadmissible in view of the decision in the *Updike case*, holding squarely that the carrier could not pay one shipper for transportation

service and deprive another of compensation for similar service.

Other cases cited by appellants in support of the carriers' exclusive contracts with them, viz, *Delaware, Lackawanna and Western R. R. Co.* v. *Morristown,* 276 U. S. 182; *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279; *Black and White Taxicab Co.* v. *Brown and Yellow Taxicab Co.,* 276 U. S. 518; *Chicago & New Orleans R. R. Co.* v. *Pullman Southern R. R. Co.,* 139 U. S. 75; *Express cases,* 117 U. S. 1, are inapposite, because in none of those cases was the carrier dealing with a shipper and none of them related to common carrier duties in respect of transportation.

In the *Arbuckle case; United States* v. *Baltimore & Ohio R. R. Co.,* 231 U. S. 274, in which an allowance for performing lighterage service was granted to Arbuckle Brothers and withheld from the Federal Sugar Refining Company, the circumstances surrounding the traffic of the respective shippers were different. Arbuckle Brothers' plant was within the "free" lighterage limits of New York Harbor, whereas the plant of the Federal Company was at Yonkers, beyond the lighterage limits, and there was no duty upon the carrier to lighter its traffic to Yonkers at the "flat" New York rate, or, in lieu thereof, pay the Federal Company for doing so. There is no such difference of circumstances in the case at bar.

The commission's holding in the *St. Louis Terminal case,* 34 I. C. C. 453, is not inconsistent with

its holding in the case at bar, for it is clear that the warehousemen in the *St. Louis case* operated "off-track" freight stations in St. Louis for the carriers, which stations were in good faith kept open to all shippers as public freight stations. This is the test applied in the *Arbuckle case.*

But, both the Commission and the court below found that the services performed by appellants are not transportation services (cf. *Louisville & Nash. R. Co.* v. *United States (Private Car Case)*, — U. S. —, 75 L. Ed. 407, 416, decided Feb. 25, 1931), but are warehouse trade services such as performed by any merchandise warehouse, including those operated by complainants; that the real purpose of the payments is to compensate appellants for the solicitation of traffic, which under the facts in this case cannot lawfully be paid; and that, therefore, the payments are rebates. The evidence in support of these findings is discussed in the next section hereof.

V

The Commission, having found that the services performed by appellants and complainants were not transportation services but instead were warehouse trade services, properly required the carriers to remove the discrimination by stopping the allowances to appellants rather than continuing to pay them to appellants and extending them to complainants and all others similarly circumstanced

Power to make an order requiring a carrier to cease and desist from a discriminatory practice and to prescribe the reasonable and nondiscriminatory

practice to be observed by the carrier in the future is expressly conferred upon the Commission by section 15 (1) of the Interstate Commerce Act. "Whenever discrimination is, in fact, practiced, an order to remove it may issue * * *" *Chicago, Ind. & Louis. Ry.* v. *United States*, 270 U. S. 287, 293.

The issuance of an alternative order, merely requiring the removal of the discrimination, would have left the carriers free to elect whether they would stop paying allowances to appellants or continue paying them to appellants and extend them to all other warehouses similarly circumstanced.[18] The Commission's action in prescribing definitely the manner in which the discrimination should be removed, namely, to stop paying the allowances to the appellants, was proper for the following reasons:

1. The services performed by the appellants and complainants are warehouse trade services, for the performance of which they are entitled to no compensation from the carriers.

2. The allowances were given in consideration of the appellants causing their traffic to be routed over the lines of the respective carriers.

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[18] Compare *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, 521; *United States* v. *Pennsylvania R. R.*, 266 U. S. 191, 199; *Chicago, I. & L. Ry.* v. *U. S.*, 270 U. S. 287, 292–293; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

1. The services performed by both appellants and complainants are warehouse trade services for the performance of which they are entitled to no compensation from the carriers

Leading and unloading.—That the carriers do not call upon appellants to load or unload general freight and that appellants load and unload only such freight as is shipped to and from their warehouses for their patrons, is clearly indicated by the evidence already cited. It is also clear that the complainants likewise load and unload the freight shipped to and from their warehouses.

It is a general rule of long standing in the United States that shippers are required to load, and receivers to unload, carload freight. In an early case, *Scofield* v. *L. S. & M. S. Ry. Co.*, 2 I. C. C. 90 (1888), the Commission explained why carload rates can be and are lower than l. c. l. rates, one reason being that the carload shipment "is loaded by the shipper and is unloaded by the consignee." Compare *D. L. & W. case*, 220 U. S. 235, 240. In *P. R. R. Co.* v. *Kittanning Co.*, 253 U. S. 319, relating to demurrage charges against a shipper for failure promptly to unload, the court recognized that "the duty of loading and of unloading carload shipments rests upon the shipper or consignee." See also *A. T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 216 and Commission cases there cited; and *Dunnage Allowances*, 30 I. C. C. 538, 542–543.

A few exceptions are made to this general rule. In Official Classification Territory (east of the Mis-

sissippi and north of the Ohio and Potomac) there were only 11 points excepted at the time of the Commission's report in *Loading and Unloading Carload Freight,* 101 I. C. C. 394 (1925) and the Commission's approval of the carriers' proposal there reduced the number to four. Philadelphia is one (*Ibid.,* 396; R. 341, 446). But these exceptions apply only at certain of their public freight stations in Philadelphia; they do not apply to carload freight, bulk or package, shipped to or from public team tracks or private sidetracks. Ex. 100, R. 745, Ex. 101, R. 764, and Ex. 102 contain the names of several hundred business establishments in Philadelphia having private sidetracks connecting with the P. R. R., B. & O., and Reading, and all of these must load and unload their carload freight without any contribution to the expense thereof by the carriers. Railroads have not made it a practice, either by general rule or by exception, to load or unload on private sidetracks. (R. 297–298.)

Section 1 (3) of the Act defines the term "transportation" as including, among other things, "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported," and par. (4) of the same section provides that carriers shall furnish such transportation "upon reasonable request therefor." These provision give the Commission full jurisdic-

tion over the matters referred to (*Atchison, T. & S. Fe Ry. Co.* v. *United States*, 232 U. S. 199; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43; compare *Director General* v. *Viscose Co.*, 254 U. S. 498), and are to be read in connection with par. (5) of section 1 providing that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, *or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful.

These provisions do not provide that a shipper or receiver of freight who loads or unloads his carload freight transported at the carload rate is entitled as a matter of law to an allowance out of the carload rate for performing that service. In *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. *supra*, the service rendered by the shipper was obviously one connected with the transportation—work done on care to render them suitable and adequate for transportation. Yet the court clearly recognized that there was no absolute legal duty upon the carrier to furnish that service or pay the shipper for performing it. If there had been, the lower court would have had jurisdiction over the shipper's suit for allowances without prior action by the Commission. But the court held that the problem was one directly concerning rate-making, an administrative question for the Commission, which is au-

thorized to determine the reasonableness of rates and the reasonableness of the inclusion or exclusion of particular accessorial services under those rates. In its opinion, rendered by Mr. Justice McReynolds, the Court said:

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry.* v. *United States,* 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. * * * Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted. (*Ibid.*, 50.)

The rate structure of the country for carload traffic has been built up upon the basis of shippers

loading and consignees unloading freight carried at carload rates. In *Loading and Unloading Carload Freight,* 101 I. C. C. *supra,* the Commission found that the rates had been fixed at a level which did not include the expense of loading and unloading by the carrier, and fixed as reasonable a charge of 2½ cents per 100 pounds, or 50 cents per ton, to be assessed in addition to the line-haul rate, when the carriers performed the loading and unloading of carload package freight. (*Ibid.* 414.)

Evidence in the case at bar showed that the rates to and from Philadelphia have not been at any time since before the passage of the Act to regulate commerce in 1887 increased so as to include anything for the service of loading or unloading at Philadelphia. (R. 331–337.)

The present carload rates being lower than they would be otherwise in consideration of the shippers loading and unloading, to make an allowance for that service to a shipper who has paid the carload rate is equivalent to paying the shipper twice for that service, first by the reduced rate, second by the allowance.

Loading and unloading carload freight, under circumstances similar to those under which appellants and complainants do so at their warehouses, is essentially a shipper service; at least it is one which he must ordinarily perform when he is charged only the carload rate. And it is a service included among those for which the warehouses

make a charge against their customers, the unloading charge sometimes being stated separately as a labor or handling charge. (See Ex. 6, R. 549–555; Ex. 44, R. following 596; compare R. 213, 274.)

Sending of arrival notices.—The evidence establishes that the sending of notices of arrival by appellants and complainants to their customers is a warehouse trade service, and is not, therefore, performed for the railroad. (See Ex. 6, R. 550; Ex. 42, R. opp. 596, R. 220, 271, 274.) The railroad, in connection with each inbound carload, participates in a *carload* transaction which is consummated when the railroad delivers the inbound car to the warehouse company. The railroad makes out a notice of arrival which it sends or gives to the warehouse company. (See R. 327, 350, 371, 422–423; see also Exs. 80 and 96 which show that the waybill, freight bill, arrival notice, and delivery receipt are all struck off at one writing.) Therefore, no activity of the warehouse company displaced that service of sending or giving notices of arrival which was actually performed by the carrier itself. Further, the notices of arrival sent out by the warehouse company were of a form adapted to its private business which differed from the form of arrival notices used by the carrier. (R. 403, 444; Exs. 90, 91, 92, 95, and 97.)

Collection of freight charges.—The carrier of course has a lien on property transported and may refuse to relinquish possession at destination until the freight charges are paid. (Compare Section

3(2) of the Interstate Commerce Act.) It may even require prepayment. No difficulty attends the collection of freight charges, and the carrier is not relieved of the necessity of *receiving* the money in any event. In many cases the warehouse is the only party from whom the carrier can collect its freight charges for the carload shipment. For instance, the Furniture Manufacturers Association of Grand Rapids ships pool cars to the complainant Terminal Warehouse Co. for distribution to the Philadelphia trade. The Association ships these cars to itself in care of the warehouse. They move "Freight Collect" and the warehouse pays the carload freight charges to the railroad, but later collects the freight charges, on a pro rata basis, from the various customers having consignments in the car. (R. 271.) Since the carriers' Rule 14 (Ex. 33, R. 567) provides that only one freight bill shall be issued for a carload shipment, it is obvious that in cases like those just described the warehouse is the only party to whom such freight bill can be issued and the only party from whom the one collection of the freight charges at the carload rate can be collected. Where the warehouse company collects the freight charges it is part of its warehouse trade service and does not, in any event, relieve the carrier of work which it must necessarily do for itself.

Giving 48 hours free time.—Appellants, by virtue of the allowances they receive from the railroads,

are able to give their patrons two days' free storage. They use this concession as an inducement to obtain warehouse business, as indicated by their letters to prospective customers. (Ex. 6, R. 549–555; Exs. 42–47, R. opp. 596; Ex. 50, R. opp. 598.) Complainants, not having the aid of allowances, have lost business because they could not meet that competition. (R. 206–207; 210; 223–224; 236–238; 240–241; 251–252; 277–278; 282–283; Exs. 22 and 25, R. opp. 562.) In some few instances, in order to keep a valuable account, they have accorded the privilege, resulting in skrinkage of their normal profits. (R. 223, 238, 252–253, 278.) In most instances they can not afford to do it. The carriers do not collect any storage charges on freight stored in appellants' warehouses; and it is clear that any freight so stored is stored, not as any part of the railroads' common carrier duties, but as a part of the warehouse service to warehouse patrons, as so strikingly demonstrated by appellants' letters above cited.

The other services alleged to be performed for the carriers, such as checking contents of car, noting condition of seals and of the goods in the car, tallying contents, etc., (R. 376 et seq., R. 398 et seq.) are shipper services, which can not be made the basis for allowances. The complainants do all these things as a necessary part of their warehouse business. (R. 203–204; 219–220; 235–237; 252–253; 270–272; 274; 278–279; 431–432.)

2. The allowances are given in consideration of the appellants causing their traffic to be routed over the lines of the respective carriers

Having in mind that the Pennsylvania, the Baltimore & Ohio, and the Reading are keen competitors for the large, important traffic of Philadelphia, let us examine the contracts between these lines and their allied warehouses, giving attention first to the contracts between the Pennsylvania and the Merchants Warehouse Company. (Ex. No. 1 R. 455–526.) The Merchants Warehouse Company operates 10 warehouses in Philadelphia and there is a separate contract covering each of them. (R. 319.) Each provides that "without the consent of the railroad company the said facilities [of the warehouse company] shall not be extended to traffic passing over other lines." Each further provides that no allowance will be made to the warehouse company "upon freight the movement of which by the railroad has been performed at a switching rate." (R. 456–457; 463–464; 469–470; 473–474; 478; 482; 489–490; 496–497; 504–505; 513–514; 520–521.) These two provisions, taken together, have the following effects: (1) to require the Merchants Warehouse Company to cause both its inbound and outbound freight to move over the Pennsylvania Railroad; (2) to assure the Pennsylvania of a *line-haul* movement as distinguished from a mere switching movement performed at a switching rate. In other words, these two provisions assure the Pennsylvania of the movement

over its lines, at line-haul rates, of all the traffic of the Merchants Warehouse Company. In order to earn its allowance, the warehouse company must cause the shipment to move over the Pennsylvania. Four of the contracts, in addition to the above-mentioned provisions, contain a further provision which obligates the warehouse company—

> "to use all reasonable efforts to secure to the lines of The Pennsylvania Railroad Company's system, * * * all traffic controlled by it or destined to or from the warehouse * * *." (R. 497, 505, 513–514, 521.)

It follows that the larger the business of the Merchants Warehouse Company, the greater the volume of traffic moving over the Pennsylvania. And on account of the free services and the lower warehouse charges which the Merchants is enabled to accord to its customers by reason of the allowances from the Pennsylvania, the Merchants is able to draw business away from its warehouse competitors in Philadelphia, and to secure new business for which its competitors are unable successfully to bid. All of such business obtained by the Merchants moves over the Pennsylvania.

To meet this competitive situation, the Reading has entered into a similar arrangement with a Philadelphia warehouse company. The Reading Company (successor to the Philadelphia & Reading Railway Company, R. 358) in its contracts with the Pennsylvania Warehousing & Safe Deposit Com-

pany (Exhibits Nos. 53 to 56, R. 603–663) agrees to pay allowances to that warehouse company on all traffic transported by it in line-haul service—switch movements are expressly excepted—to and from its warehouses (R. 618, 636, 655), and the warehouse company covenants "to appoint at least one agent who in addition to the general superintendent of the warehousing company * * * shall solicit consignments over the railway company's lines to warehouse, by mail and by personal application to local shippers and consignees; and one of whom shall visit western shippers of flour in September and March of each year * * * for the purpose of securing consignments over the lines of the railway company to and through said warehouse * * *" (R. 614–615, 632–633, 651–652).

Plainly, this provision obligates the warehouse company to solicit traffic for movement over the Reading; it is at the same time a solicitation of business for the warehouse company.

If this warehouse company charged greater warehouse fees than its competitors in Philadelphia, it would stand to lose business, and if it lost it, so would the Reading. In recognition of this fact, the Reading's contracts impose upon the warehouse company the obligation—

> To make the consignees or consignors no other or greater charge or charges for services rendered in handling, receiving, storing or shipping merchandise than are charged for the time being by other warehousing

> companies for similar services upon the lines of the Pennsylvania Railroad, or warehousing companies on the lines of the Baltimore and Ohio Railroad, in the city of Philadelphia, unless the consent of the railway company to make higher charges shall be given in writing; * * * (R. 615, 633, 652.)

A similar provision is contained in the contract between the Reading and the Philadelphia Warehousing & Cold Storage Co. (See Ex. 57, R. 664–692, at R. 689.) This contract also provides (R. 688)—

> that the said payments shall not be made by the Railway Company in respect of any merchandise transported by it for which it shall have only rendered a switching or transfer service to or from other lines of railroad or to or from other warehouses.

Further evidencing the competitive situation is the provision that the allowances to be paid by the carrier to the warehouse company—

> shall be changed from time to time by mutual agreement so as to conform to the course of business at other railroad warehouses in the City of Philadelphia. In case the parties shall fail to agree upon a fair and reasonable increase or diminution of such time or charges, *to meet current competition*, the same shall be determined by arbitration, * * *. (Italics ours.) (R. 688.)

The Baltimore & Ohio has likewise taken action to meet the competitive situation, and agrees to pay allowances to the Pennsylvania Warehousing &

Safe Deposit Company upon all of the carload traffic of that company on which it receives a line haul (R. 714, 717, 738) *but only so long as the other railroads in Philadelphia make similar allowances to competitive Philadelphia warehouses.* Its contract of August 2, 1926, with that company (Exhibit No. 88 R. 734) provides (R. 736):

> * * * the Railroad Companies agree to pay to the Warehousing Company as a terminal allowance for the facilities to be afforded as provided in and by the aforesaid agreements, fifty cents ($.50) per net ton of two thousand (2,000) pounds for every net ton moved into or out of the Twenty-third Street Stores of the Warehousing Company over the lines of the railroads of the Railroad Companies on which they receive a road haul instead of the Thirty-five cents ($.35) per net ton as in said agreements mentioned so long as any other railroad in Philadelphia competitive with the Baltimore and Ohio, shall make similar allowances to other Warehousing Companies in Philadelphia competitive with the Pennsylvania Warehousing and Safe Deposit Company unless sooner estopped from making such allowance by a decision or order of the Interstate Commerce Commission, the Public Service Commission of Pennsylvania, Court of Competent Jurisdiction or by law.[10]

[10] The term "railroad companies" is in the plural because the contract is executed by the B. & O. and by two of its subsidiaries, the Baltimore & Philadelphia Railroad Company and the Schuylkill River East Side Railroad Company.

The B. & O.'s letter dated August 2, 1926 transmitting the above contract to the warehouse company (which letter, R. 737–738, is part of Exhibit No. 88) extends the above-quoted convenant to other warehouses of the Pennsylvania Warehousing & Safe Deposit Company and defines the Philadelphia railroads which are to be considered competitive with the B. & O. as follows:

> * * * in executing and delivering the agreement enclosed, we do so with the understanding that the language of its third paragraph, i. e.
>
> "so long as any other railroad in Philadelphia competitive with the Baltimore and Ohio, etc., * * *" shall be taken to mean and include the Pennsylvania and Philadelphia & Reading Railroads only, * * * (R. 738.)

The above evidence, considered in the light of the record as a whole, supports the Commission's finding that the allowances are paid to these warehouses solely as compensation for solicitation of freight for movement over the lines of the respective carriers. This being so the allowances are unlawful.

In *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, Sheldon & Co., forwarding agents, by arrangement with the carrier, so far as it was able sent the goods over the carrier's line, and for doing so received from it a varying percentage of the published rates and also a salary. The court, af-

firming the decree of the lower court enjoining such payments as illegal rebates, held:

> If the shipper were the owner an allowance to him of a percentage upon the freight *as an inducement to ship by that line,* however honest and however justifiable on commercial principles, would be contrary to the Act to Regulate Commerce as it now stands. Act of June 29, 1906, c. 3591, sec. 2, 34 Stat. 586, 587, amending sec. 6 of the original act, etc. See also the original Act of February 4, 1887, c. 104, sec. 2, 24 Stat. 379. *Wight* v. *United States,* 167 U. S. 512. But the above cases [*Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.,* 220 U. S. 235; *Great Northern Ry. Co.* v. *O'Connor,* 232 U. S. 508] show that the carrier cannot inquire whether the shipper is the owner and therefore the statute expresses a necessary policy when it forbids in universal terms refunding in any manner any portion of the rates specified in the published tariffs or extending to 'any shipper' any privilege not so specified. Of course it does not matter whether the allowance takes the form of a deduction or a cross payment. *Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.* (Italics ours.)

The court further held that services rendered by the forwarder to the carrier in maintaining offices, advertising the railroad and soliciting traffic over

it are not services connected with the transportation for which an allowance may be made by the carrier under section 15 (13) of the Interstate Commerce Act, distinguishing *I. C. C.* v. *Peavey*, 222 U. S. 42, which, Mr. Justice Holmes said, "goes to the verge of what is permitted by the act."

The fact that the allowances are covered by contracts does not, of course, affect the application of the law or the power of the Commission to require the carrier to cease paying them upon a finding that they result in violations of provisions of the Interstate Commerce Act. *Louis. & Nash R. R.* v. *Mottley*, 219 U. S. 467; *Chi., Ind. & L. Ry. Co.* v. *United States*, 219 U. S. 486; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81; *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Phila., Balt. & Wash. R. R.* v. *Schubert*, 224, U. S. 603, 613; compare *United States* v. *United Stock Yards*, 226 U. S. 286, 308–309; *Vandalia R. R.* v. *United States*, 226 Fed. 713 (7th C. C. A.), certiorari denied, 239 U. S. 642; *Northern Cent. Ry.* v. *United States*, 241 Fed. 25 (2nd C. C. A.); *Fourche R. R. Co.* v. *Bryant Lumber Co.*, 230 U. S. 316, 323; *C. of G. Ry. Co.* v. *Blount*, 238 Fed. 292; *C. C. C. & St. L. Ry.* v. *Hirsch*, 204 Fed. 849.

As stated by Mr. Justice Pitney in *O'Keefe* v. *United States*, 240 U. S. 294, 297,

> It is not only within its power, but the law makes it the duty of the Commission to make

orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear.

It is shown in this case that the allowances paid by the three Philadelphia railroads to their several contract warehouses aggregate a large sum annually. To correct the discrimination by extending similar payments to all the other Philadelphia warehouses would materially increase that aggregate. But the railroads could not stop with warehouses; for, if discrimination were to be avoided, allowances would have to be paid to all other shippers and receivers of carload freight upon private sidetracks and public team tracks, in Philadelphia, who load and unload. The carriers have anticipated this—see Exhibit 38–A, R. 593. No doubt the carriers are willing to be relieved of this burden. This would seem to be indicated by their failure to attack the Commission's orders either in this case or in the *Baltimore case*. (Compare R. 232–233.) Of course, if the allowances continue in Philadelphia they will be restored in Baltimore; and they will have to be extended inevitably to many other cities.[17]

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[17] It was testified by Assistant General Freight Agent Funck, of the Pennsylvania, that warehouse freight is now delivered in a great many cities in this country when transported by the Pennsylvania without giving any allowance. (R. 341.)

THE CROSS APPEALS

I

The court below erred in staying the operation of the Commission's order pending appeal

The single question involved in the cross appeals is whether the court below erred in staying and suspending enforcement of the Commission's order pending determination of the appeals by this court. We think the court did so err for the following reasons:

1. It was not shown that the appellant would otherwise suffer irreparable injury. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672–675. The court below based its stay order, in part, "upon the fact of irreparable injury following its refusal." But at the same time the court recognized that appellants' loss "would be barely more than negligible" if the allowances could be recovered after a reversal of the final decree. (R. 94.) The Commission had found, as a fact, that the services performed by the appellants, for which the allowances were paid, were warehouse trade services, such as performed by any merchandise warehouse. It follows from this fact that even though the allowances were stopped the appellants would continue to perform these services, as part of their private business activities. If, then, the Commission's order requiring cessation of these allowances were held invalid by this Court on the ground that the Commission erred in finding as a fact that the services were trade

services and not transportation services, the appellants could have readily recovered all allowances on shipments moving in the meantime, either by the voluntary act of the carriers, or by proceedings before the Commission under section 15 (13) or by suit in court. Thus the injury, if any, which the appellants would suffer by reason of the denial of the stay would not in any event have been irreparable.

2. No bond was required by the court to indemnify the warehouse companies suffering the discrimination pending determination of the appeal. Section 210, Judicial Code, 36 Stat. 1150 (U. S. Code, Supp. III, Title 28, Section 47a) provides (substituting "District Court" for "Commerce Court" as in the code):

> Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require.

In the *Virginian case, supra,* it was held that the district courts, as well as the Supreme Court or a justice thereof, have power to allow such stays, but the necessity for a bond remains. Cf. *Beaumont, S. L. & W. Ry.* v. *United States,* 282 U. S. 74, 91. The only bonds required of appellants in the case

at bar were the usual appeal bonds securing costs. (R. 106, 822, 879.)

Since the railroad companies which practiced the discrimination were not parties to the litigation, apparently to require a bond was impracticable. Liability for damages suffered pending appeal by the complainant warehouse companies arising out of the discrimination was upon the railroad companies and not upon appellant warehouses. Hence, no indemnity bond, such as contemplated by Section 210 of the Judicial Code, could be required of appellants. But this did not permit the statutory requirement of a bond to be waived. Rather it seems to indicate that under the circumstances the stay should have been denied. And it seems but to illustrate the lack of standing of appellants to maintain the suit.

3. The finding of the District Court that the allowances were rebates should have precluded the issuance of a stay. By the stay the court sanctioned the continued payment of what it itself, as well as the Commission, had found to be rebates.[18] No complaint is made of the action of the court in issuing the temporary stays of the Commission's order until the court could reach a decision. But when, after hearing and full consideration, as indicated by its opinion, the court determined and concluded that the allowances were unlawful rebates,

[18] In the *Baltimore case*, too, where the facts were parallel, the Commission and the Maryland court found the allowances were rebates.

its action in permitting the continuance of them, instead of stopping their payment at once, seems clearly erroneous.

4. The granting of the stay was contrary to the policy of the law to afford prompt relief in discrimination cases. The prohibition of inequalities among shippers is perhaps more fundamental and vital than any other feature of the Interstate Commerce Act. The vital necessity to a shipper of rates equal to those of his competitor often transcends even the importance of reasonable rates. "The evil of discrimination was the principal thing aimed at" by the Interstate Commerce Act. *Shreveport case,* 234 U. S. 342, 356. In recognition of this evil and of the detriment and injury to a business subjected to continued prejudice and disadvantage because of discriminatory rates, the law has provided for prompt and effective relief. The legislative intent is manifested by section 3 of the Elkins Act (32 Stat. 847, 34 Stat. 584, U. S. Code Title 49, sec. 43), which provides—

> That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, *or is committing any discriminations forbidden by law,* a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction;

> * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances, * * * without the formal pleadings and proceedings applicable to ordinary suits in equity, * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs *or direct and require a discontinuance of such discrimination* by proper orders, writs, and process, * * * subject to right of appeal as now provided by law.

The stay orders of the court below squarely oppose the policy and purpose of the law in dealing with rebates and discriminations, for, manifestly, the legislative intention is to stop discriminations immediately, and to deprive the shippers receiving them of the unlawful benefits and advantages thereof during the period required for determination of their appeals from the injunction of the District Court, whereas the stay orders in this case permit appellants to continue receiving the allowances and the benefits of the discrimination pending determination of the appeals.

Unavoidably, a long period of time elapses between the date of the filing of a complaint with the Commission and the final determination of the controversy by this Court. If it becomes an established practice for the district courts to grant stays pending appeals, it will mean that the shipper who has proved the discrimination in the Commission proceeding must continue to suffer the prejudice and

disadvantage, if indeed he can continue in business under that handicap, until the absolute end of the litigation, though the validity of the Commission's order is upheld by the district court. It would seem that where, as in this case, virtually the only ground for granting the stay was doubt as to the validity of the order, the doubt should be resolved in favor of the shipper who has been found by two tribunals to be suffering the prejudice, rather than in favor of the advantage holder.

CONCLUSION

It is respectfully submitted that the decree of the court below dismissing the petitions for want of equity should be affirmed and that the decrees below staying the operation of the Commission's order pending appeal should be reversed.

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APPENDIX

The Interstate Commerce Act provides:

SEC. 1 (3) * * * The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. * * *

SEC. 1 (4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, * * *

SEC. 1 (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for

any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 3. (2) No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or

Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. * * * If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, nothwithstanding the foregoing provisions of this paragraph. * * *

SEC. 6. (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the

rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 10. (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet

therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

SEC. 10. (2) Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

SECTION 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such

transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered, or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The Elkins Act provides:

SEC. 1. That any thing done or omitted to to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changes. The will-

ful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition

to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said

court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce" and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or

produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

The Judicial Code provides:

SEC. 210. A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme

Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

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